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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

 **COPY**

THE KROGER CO.,

:

PLAINTIFF, :

-VS-

: CASE NO.: C-1-02-439

MALEASE FOODS CORP.,

:

DEFENDANT.:

Deposition of JONATHAN D. LIBBERT, CPA,

CFE, a witness herein, taken by the defendant as

upon cross-examination pursuant to the Federal

Rules of Civil Procedure, and pursuant to agreement

and stipulations hereinafter set forth at the

offices of Frost, Brown & Todd, LLC, 2200 PNC

Center, 201 East Fifth Street, Cincinnati, Ohio at

1:48 p.m. on Wednesday, March 3, 2004, before

Britney L. Fisher, a notary public within and for

the State of Kentucky.

1 APPEARANCES:

2 On behalf of the Plaintiff:

3 Douglas R. Dennis, Esq.

4 and

5 Scott D. Phillips, Esq.

6 of

7 Frost, Brown & Todd, LLC

8 2200 PNC Center

9 201 East Fifth Street

10 Cincinnati, Ohio 45202

11 On behalf of the Defendant:

12 Robert W. Cinque, Esq.

13 of

14 Cinque & Cinque, P.C.

15 845 Third Avenue

16 New York, New York 10022

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18 S T I P U L A T I O N S

19 It is stipulated by and between counsel
20 for the respective parties that the deposition of
21 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,
22 may be taken as upon cross-examination pursuant to
23 the Federal Rules of Civil Procedure, and pursuant
24 to agreement; that the deposition may be taken in

1 stenotypy by the notary public-court reporter and
 2 transcribed by her out of the presence of the
 3 witness; that the jurisdiction of the notary
 4 public-court reporter is waived; and that the
 5 transcribed deposition is to be submitted to the
 6 witness for his examination and signature, and that
 7 signature may be affixed out of the presence of the
 8 notary public-court reporter.

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10 I N D E X

11 WITNESS

CROSS-EXAMINATION

12 Jonathan D. Libbert, CPA, CFE

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14 E X H I B I T S

15 DEPOSITION EXHIBITS

MARKED

16 Y, report of Mr. Libbert.

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(Witness sworn.)

JONATHAN D. LIBBERT, CPA, CFE

of lawful age, a witness herein, being first duly sworn as hereinafter certified, was examined and deposed as follows:

CROSS-EXAMINATION

BY MR. CINQUE:

Q. Mr. Libbert, who engaged you on behalf of Kroger?

A. The law firm of Frost, Brown & Todd.

Q. Which person in the law firm?

A. It's been a while, I believe it may have been Mr. Phillips.

Q. Is this the first time you've done any work with Mr. Phillips' law firm?

A. No.

Q. How many times have you done work with the Frost, Brown firm?

A. Probably four or five times.

Q. And you're receiving a fee of \$175 per hour; is that correct?

A. Yes, at the time I was engaged. We update that the first of the year each year.

Q. Well, how much?

1 A. \$190.

2 Q. Bargain. How much have you billed so
3 far?

4 A. It's been pretty minimal. I didn't
5 bring the billing records, but my guess would be
6 six, eight hours.

7 Q. And in connection with the
8 preparation of your report, which I happen to have
9 here, we'll mark that as our next exhibit.
10 (Deposition Exhibit Y was marked for
11 identification.)

12 BY MR. CINQUE:

13 Q. Okay. This is your report, correct?

14 A. Yes.

15 Q. Who typed it?

16 A. I did.

17 Q. So that's your Word processor?

18 A. Yes.

19 Q. All right. And did you review any
20 documents in connection with this report?

21 A. Yes.

22 Q. Okay. What did you look at?

23 A. Well, it's stated right here in my
24 report I reviewed the complaint, the sale lease

1 back document, and that there were other items that
2 were furnished to me.

3 (Mr. Phillips left the room.)

4 Q. Okay. Now, you state here on the
5 second page or the page with your opinions if the
6 lease for the San Marcos property had been renewed
7 under normal business conditions, basically the
8 rent would have been substantially higher, et
9 cetera. Do you see that?

10 A. Yes.

11 Q. Did you review the lease?

12 A. I believe I did.

13 Q. You believe you did or did you?

14 A. Well, there's a complete copy of my
15 file that's here, we can look at the file.

16 Q. I want to know what you remember?

17 A. I believe that I did.

18 Q. Okay. And what did you determine
19 when you reviewed the lease with respect to this
20 finding?

21 A. There was what I call the original
22 sublease under the renewal for that sublease, that
23 the monthly rent was a little bit over \$8,200 per
24 month.

1 Q. Okay. And, therefore, what did you
2 conclude?

3 A. That beginning April 1st of 2003
4 there was an additional agreement between Kroger
5 and the H.E. Butt Company that provided for the
6 payment of \$48,125 per month.

7 Q. Okay. So that's almost a reduction
8 of 50 percent, correct?

9 A. It's probably about 40 percent.

10 Q. Okay.

11 A. I think it's closer to 50, but my
12 arithmetic may be wrong.

13 Q. And what was the reason for that
14 reduced rent?

15 A. It was my understanding that this was
16 in recognition of, I'll call it, the deal to sell
17 the property not being able to be closed.

18 Q. What's the basis of your
19 understanding.

20 A. The basis was conversations with
21 people from Kroger.

22 (Mr. Phillips entered the room.)

23 Q. Which people?

24 A. Primarily Ed Waldvogel.

1 Q. What did he tell you?

2 A. He told me that was the reason why
3 they reduced the rent.

4 Q. What did he say?

5 A. I think I just answered that.

6 Q. You can answer it again. I don't
7 know that I heard your answer entirely, but go
8 ahead.

9 A. He said that's the reason the rent
10 was reduced, because as it states right here on the
11 document failure -- decrease in rent due to failure
12 to close.

13 Q. So you're basing your opinion on
14 information that Waldvogel gave you; is that
15 correct?

16 A. Well, I did review the documents
17 myself as well.

18 Q. Okay. And did your review of the
19 documents furnish you with any information that you
20 used in your conclusion?

21 A. Well, it was a result of all of the
22 work that I've done, both the conversation and the
23 review of the documents.

24 Q. Okay. Is there anything in the

1 document that led you to believe that the reason
2 the rent was reduced was dependency of the
3 transaction?

4 A. I would have to go back and look at
5 the document.

6 Q. Go ahead.

7 THE WITNESS: Do we have it here?

8 MR. PHILLIPS: Yeah.

9 THE WITNESS: Are these the
10 documents from my file?

11 MR. DENNIS: I think so.

12 THE WITNESS: I don't see the
13 document I'm looking for here.

14 (Mr. Phillips left the room.)

15 BY MR. CINQUE:

16 Q. What document are you looking for?

17 A. I'm looking for the document that was
18 the agreement effective April 1st, 2003.

19 Q. Is that something that you looked at
20 to form the basis for your conclusion about the
21 reduction in rent?

22 A. That was one of the documents that I
23 looked at, yes.

24 Q. You don't have it here?

1 A. I don't see it here.

2 Q. Okay. The annual threshold rate that
3 you reflect on your report, did you put those
4 quotations around threshold?

5 A. Yes.

6 Q. Why did you do that?

7 A. That's the terminology that Mr.
8 Waldvogel used.

9 Q. What does it mean?

10 A. Well, it can mean a couple of
11 different things.

12 Q. What did it mean to you in your
13 report?

14 A. The rate that was used here was an
15 attempt to kind of hit the middle ground between
16 what Kroger would use when they invested the money
17 to build new properties, and the rates that they
18 were paying on current debt.

19 Q. Twelve percent, is that what you're
20 saying?

21 A. That's the number that's on this
22 piece of paper.

23 Q. I'm trying to understand. Explain
24 the relationship between the so-called threshold

1 rate and any calculations to which it applies?

2 A. Well, once again, the 12 percent is
3 sort of the middle ground between what Kroger
4 normally would achieve in investing new money,
5 which I believe is around 18 percent.

6 Q. So you're basing your conclusion on
7 the fact that invariably when Kroger has money to
8 invest, it earns a yield of what?

9 A. Well, they have told me it was 18
10 percent.

11 Q. Did you do anything to independently
12 verify that?

13 A. Not at this time.

14 Q. Okay. Now, you use the figure \$11
15 million, do you see that?

16 A. Yes.

17 Q. Where did you get that figure?

18 A. I believe that was from a document
19 for the sale of that property. I believe there
20 were three different properties in the sale
21 agreement, and each price was spelled out
22 separately.

23 Q. Did somebody give you that number or
24 did you find it somewhere?

1 A. I think both. I think somebody gave
2 it to me and it was in the documents.

3 Q. And who's that someone, Waldvogel?

4 A. Yes.

5 Q. Now, the \$11 million figure, what
6 does that represent?

7 A. I was told that was the selling price
8 of the warehouse in San Marcos, Texas.

9 Q. Did you factor in any income tax
10 consequences in any of these calculations?

11 A. No.

12 Q. So the way you did this is you
13 assumed that, if it sold for \$11 million, Kroger
14 would have the \$11 million available for
15 investment; is that correct?

16 A. Yes.

17 Q. Why didn't you consider income tax
18 consequences?

19 A. I didn't think it was appropriate.

20 Q. And what made you not think it was
21 appropriate?

22 A. If Kroger had been able to sell this
23 warehouse when they thought they were going to,
24 they would have had the \$11 million in cash. And

1 they would have been able to invest that money or
2 to pay off the existing debt.

3 Q. And when was this money to be
4 available to Kroger as you've just described it?

5 A. I believe it would have been some
6 time around April 1st of 2003.

7 Q. And we're sitting here in the
8 beginning of March of 2004, are there any income
9 tax consequences involved in the receipt of that
10 \$11 million, as you sit here today?

11 A. I'm not a tax expert, but I'm sure
12 there would be.

13 Q. Okay. You didn't factor in anything
14 for income tax one way or the other, correct?

15 A. That's correct.

16 Q. In your experience has Kroger ever
17 lost any money on any investment its ever made?

18 A. I've never had any previous dealings
19 with Kroger.

20 Q. So what is your assumption then that
21 Kroger would have earned how much on \$11 million,
22 is it 12 percent?

23 A. Yes, it is.

24 Q. Okay. And that's based simply upon

1 the discussion you had with Waldvogel, correct?

2 A. Primarily, yes.

3 MR. CINQUE: All right. That's all
4 I have for the witness.

5 MR. DENNIS: Okay.

6 MR. CINQUE: Thank you.

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11 JONATHAN D. LIBBERT, CPA, CFE

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13 DEPOSITION CONCLUDED AT 2:03 P.M.

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C E R T I F I C A T E

STATE OF KENTUCKY:

: SS

STATE AT LARGE :

I, BRITNEY L. FISHER, the undersigned, a duly qualified and commissioned notary public within and for the State of Kentucky, do hereby certify that before the giving of his aforesaid deposition, the said JONATHAN D. LIBBERT, CPA, CFE was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that the foregoing is the deposition given at said time and place by the said JONATHAN D. LIBBERT, CPA, CFE; that said deposition was taken in all respects pursuant to agreement; that said deposition was taken by me in stenotypy and transcribed by computer-aided transcription under my supervision; that the transcribed deposition is to be submitted to the witness for his examination and signature; that I am neither a relative of nor attorney for any of the parties to this cause, nor relative of nor employee for any of their counsel, and have no interest whatever in the result of the action.

1 IN WITNESS WHEREOF, I hereunto set my hand
2 and official seal of office at Cincinnati, Ohio,
3 this day of , 2004.

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5
6
7 MY COMMISSION EXPIRES: BRITNEY L. FISHER
8 JULY 3, 2005. NOTARY PUBLIC-STATE OF
9 KENTUCKY

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF OHIO
 3 WESTERN DIVISION
 4 - - -

3 THE KROGER CO., :
 4 PLAINTIFF, :
 5 -VS- : CASE NO. C-1-02-439
 6 MALEASE FOODS CORP., :
 7 DEFENDANT.:
 8 - - -

6 Britney L. Fisher, a court reporter, first
 7 duly cautioned and sworn, testifies and affirms
 8 that JONATHAN D. LIBBERT, CPA, CFE, a witness
 9 herein, was notified that the transcript was ready
 10 for review and signature on Wednesday, March 17,
 11 2004 2004, by forwarding a copy of the transcript
 12 to Mr. Scott Phillips, Esq.

10 Within thirty-one days (pursuant to Rule
 11 (30)E of the Federal Rules of Civil Procedure),
 12 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,
 13 did not present signature of said deposition.

13 The original transcript is now being
 14 tendered into the hands of Mr. Robert W. Cinque,
 15 Esq.

15 Further affiant sayeth naught.
 16

17 Britney L. Fisher
 18 Sworn to me and subscribed in my presence this
 19 day of , 2004.

20
 21 Pamela Sue Spangler
 22 Notary Public: State of Ohio
 23 My commission expires:
 24 April 29, 2007